UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	Case No. 1:08-CR-00366-JSR
JAMES TREACY,	:	
Defendant.	:	

DEFENDANT'S AMENDED REQUEST TO CHARGE

Pursuant to Federal Rule of Criminal Procedure 30, Defendant James Treacy respectfully submits the attached proposed jury instructions.

Defendant respectfully reserves the opportunity to submit additional or modified instructions if necessary.

Respectfully submitted,

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Dated: April 13, 2009

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I. PRELIMINARY INSTRUCTIONS – AT BEGINNING OF TRIAL

REQUEST NO. 1:

Preliminary Jury Instructions in Criminal Case

Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of the jury

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not.

Nothing the Court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

Evidence

The evidence from which you will find the facts will consist of the testimony of witnesses, documents, and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the Court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the Court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the Court has excluded or told you to disregard is not evidence and must not be considered.

4. The indictment is not evidence.

5. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

Rules for criminal cases

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment against the defendant is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant starts out with a clean slate.

Second, the burden of proof is on the government until the very end of trial. The defendant does not have the burden to prove his innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you from considering whether he may or may not have testified.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this later, but bear in mind that in this respect a criminal case is different from a civil case.

Conduct of the jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone, including anyone else on the jury, or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to the Court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[If the Court allows note taking:] If you wish, you may take notes. But if you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use, and should not be discussed or shared with other jurors.

Course of the trial

The trial will begin shortly. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor arguments.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if he wishes, present witnesses whom the government may cross-examine.

A defendant is not required to make an opening statement or offer any proof. As I have already told you, the defendant has no burden of proof; he is presumed to be innocent of the charges. If the defendant decides not to make an opening statement or offer of proof, in no respect may this be considered against him.

After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the Court will instruct you on the law. After that you will retire to deliberate on your verdict.[1]

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[1] Benchbook for U.S. District Court Judges, Instrs. 2.07, 2.08 (4th ed., Mar. 2000 rev.).

The "Summary of applicable law" section of Instruction 2.07 (Benchbook p. 97) has been omitted, in light of the Summary of Charges in Preliminary Instruction 11, below.

The penultimate paragraph is inserted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 1-1 (2007), to clarify that the defendant is not required to offer proof and may not have the failure to offer proof held against him.

REQUEST NO. 2:

Preliminary Instruction – Publicity

There may be some newspaper attention given to this case, or there may be some talk about it on the radio or television. If there is that kind of media attention during the trial, you must insulate yourselves from all information about this case, except what comes to you in this courtroom through the Rules of Evidence. So, when you leave here and go to your home and pick up the paper, if you see something about the case, you must put the paper down right away. Do not read the article.

I will also tell you to avoid listening to or watching any radio or television discussion of the case.[2]

[2] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-14 (2007).

REQUEST NO. 3:

Preliminary Instruction – No Research and Investigation

Remember that you must make your decision based only on the evidence that you see and hear here in court. Do not try to gather any information about the case on your own.

For example, do not consult any books, like a dictionary, and do not conduct any independent research, reading or investigation, on the internet or otherwise, about the case.

You must make your decision based only on the evidence that you will see or hear here in court.[3]

[3] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 6-190 (2001).

REQUEST NO. 4:

Preliminary Instruction – The Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your duty in an attitude of complete fairness and impartiality.

The fact that the prosecution is being brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a litigation. By that same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice. Thus, the question before you can never be: will the government win or lose the case? The government always wins when justice is done, regardless of whether the verdict is guilty or not guilty.[4]

[4] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-5 (2007); and *id.*, Comment, at 2-15 (June 2007 rev.) The second paragraph of the Sand model has been deleted because it is unduly suggestive in favor of the prosecution.

REQUEST NO. 5:

Preliminary Instruction – Conduct of Counsel

Both the prosecutors and the defense attorneys are officers of the Court. They both have important professional roles, and they both adhere to the same standards of honesty and professional conduct.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the Court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The defendant, his attorneys, and the government attorneys are now instructed not to speak to jurors or to speak about the case in your presence. Thus, you should understand that if they fail to acknowledge your presence, if you should see them at times when the Court is not in session, they are not being impolite or discourteous, but are simply following the order of the Court.[5]

[5] The first paragraph is intended to neutralize any preconceived views jurors may have about attorneys for either side. The second and third paragraphs are taken from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-8 (2007). The last paragraph is taken from 1 L. Sand, *supra*, Instr. 1-1.

REQUEST NO. 6:

Preliminary Instruction – Number of Counsel

You will also notice there are many attorneys and assistants in the courtroom, for both the government and each defendant. This is not unusual. All parties are making efforts to present their cases in the most effective manner possible. It is normal in a case such as this for each party to have multiple attorneys and assistants involved. The number of attorneys should have no bearing on your consideration of the case.[6]

[6] This paragraph has been added by the defense to ensure the jury draws no inference from the number or the roles of counsel in this case.

REQUEST NO. 7:

Preliminary Instruction – Court's Questions to Witnesses

During the course of the trial, I may occasionally ask questions of a witness. Do not assume that I hold any opinion on the matters to which my questions may relate. The Court may ask a question simply to clarify a matter—not to help one side of the case or hurt another side.

Remember at all times that you, as jurors, are the sole judges of the facts of this case.[7]

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[7] 1A O'Malley, *et al.*, Federal Jury Practice and Instructions § 11.05 (6th ed. 2006).

REQUEST NO. 8:

Preliminary Instruction – Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. For example, a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.[8]

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[8] Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Special Instruction No. 1.1 (1997) (reference to paid informers omitted); *see Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (approving this and similar pattern instructions in the First, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits). In *Banks*, the Supreme Court emphasized it had long recognized "the 'serious questions of credibility' informers pose," and the need for "customary, truth-promoting precautions that generally accompany the testimony of informants"); *see On Lee v. United States*, 343 U.S. 747, 757 (1952).

REQUEST NO. 9:

Preliminary Instruction – Indictment is Not Evidence

With these preliminary instructions in mind, let us turn to the charges against each defendant, as contained in the indictment. I remind you that an indictment itself is not evidence. It merely describes the charges made against the defendant. It is only an accusation. It may not be considered by you as any evidence against or unfavorable to the defendant.

In reaching your determination of whether the government has proved the defendant guilty on any count beyond a reasonable doubt, you may consider only the evidence introduced or lack of evidence.[9]

[9] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-1 (2007).

REQUEST NO. 10:

Preliminary Instruction – Presumption of Innocence; Burden of Proof; Reasonable Doubt

The defendant has pleaded not guilty to the offenses charged. The defendant is presumed to be innocent. He starts the trial with a clean slate, with no evidence at all against him. The presumption of innocence stays with the defendant unless and until the government presents evidence that overcomes that presumption by convincing you that he is guilty of the offenses charged beyond a reasonable doubt. The presumption of innocence requires that you find the defendant not guilty, unless you are unanimously satisfied that the government has proved guilt beyond a reasonable doubt.

The presumption of innocence means that the defendant has no burden or obligation to present any evidence at all or to prove that he is not guilty. The defendant also has no burden or obligation to testify. No presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant did not testify. The burden or obligation of proof is on the government to prove that the defendant is guilty, and this burden stays with the government throughout the trial.

In order for you to find the defendant guilty of the offenses charged, the government must convince you that the defendant is guilty beyond a reasonable doubt of the offenses charged against him. That means that the government must prove each and every element of the offenses charged against the defendant beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture or speculation are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. A reasonable doubt means a doubt that would cause an ordinary reasonable person to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

If, after hearing all the evidence, you are unanimously convinced that the government has proved the defendant guilty beyond a reasonable doubt of an offense charged against the defendant, you should return a verdict of guilty for the defendant on that offense. However, if you have a reasonable doubt as to an element of an offense, then you must return a verdict of not guilty.[10]

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[10] Adapted from Third Circuit Model Jury Instruction (Criminal) 1.13 (2006); Pattern Jury Instructions of the Sixth Circuit, Criminal Cases, Instruction No. 1.03 (2008); *United States v. Forbes*, No. 3:02 CR 264, at 5-7 (D. Conn. 2007). Although the concepts of burden of proof and reasonable doubt are covered in summary fashion in the introductory instruction, Defendants respectfully submit that these concepts are fundamental to a fair trial, *see Estelle v. Williams*, 425 U.S. 501, 503 (1976); *In re Winship*, 397 U.S. 358, 364 (1970), and should be explained to the jury in more detail than Benchbook Instr. 2.07 contains. *See* Comment to Third Circuit Model Jury Instruction (Criminal) 1.13 ("It is imperative that the trial judge accurately define the government's burden of proof and the meaning of 'beyond a reasonable doubt.'").

The second two sentences of the second paragraph, stating that the defendant has no burden or obligation to testify, are inserted from Ninth Circuit Model Jury Instruction (Criminal 3.3) (2003 ed.). They are intended to clarify that the fact that the defendant has no obligation to put on any evidence includes that the defendant has no obligation to testify.

REQUEST NO. 11:

Improper Considerations – Race, Religion, National Origin, Sex or Age

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, sex or age. All persons are entitled to the presumption of innocence and the government has the burden of proof, as I just discussed.

It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.

I repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in the case.[11]

[11] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-11 (2007).

II. INSTRUCTIONS AT CLOSE OF TRIAL

A. GENERAL INSTRUCTIONS

REQUEST NO. 1:

Introduction

Ladies and gentlemen, you are about to enter your final duty, which is to decide the fact issues in the case.

Before you do that, I will instruct you on the law. You must pay close attention to me now. I will go as slowly as I can and be as clear as possible.

I told you at the very start of the trial that your principal function during the taking of testimony would be to listen carefully and observe each witness who testified. It has been obvious to me and to counsel that you have faithfully discharged this duty. Your interest never flagged, and it is evident that you followed the testimony with close attention.

I ask you to give me that same careful attention, as I instruct you on the law.[12]

My instructions will be delivered in five parts:

First, I will give you some instructions on general rules that define the role of the Court and the duty of the jury in a criminal case;

Second, I will give you instructions that define what are called the elements of each of the offenses charged in the indictment, that is, the elements the government must prove beyond a reasonable doubt with respect to a charged offense;

Third, I will explain the defendant's positions;

Fourth, I will give you some additional rules and guidelines for your deliberations; and

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[12] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-1 (2007).

Fifth, I will instruct you on certain procedures you must follow once the jury retires to deliberate.[13]

I will give you a copy of these instructions for your use while deliberating. It is available to each of you. If you have questions about the law or your duties as jurors, you should consult the copy of the instructions as given to you.

[13] *United States v. Forbes*, No. 3:02 CR 264, at 2 (D. Conn. 2007).

REQUEST NO. 2:

Role of the Jury

Your final role is to pass upon and decide the fact issues that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

I shall later discuss with you how to pass upon the credibility—or believability—of the witnesses.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. In this connection, you should bear in mind that a question put to a witness is never evidence. It is only the answer which is evidence. Nor is anything I may have said during the trial or may say during these instructions with respect to a fact matter to be taken in substitution for your own independent recollection. What I say is not evidence.

The evidence before you consists of the answers given by witnesses—the testimony they gave, as you recall it—and the exhibits that were received in evidence.

The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

You may also consider the stipulations of the parties as evidence.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witness. You are expressly to understand that the Court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice as to any party.[14]

[14] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-3 (2007).

REQUEST NO. 3:

The Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality.

The fact that the prosecution is being brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a litigation. By that same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice. Thus, the question before you can never be: will the government win or lose the case? The government always wins when justice is done, regardless of whether the verdict is guilty or not guilty.[15]

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[15] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-5 (2007) ; and *id.*, Comment, at 2-15 (June 2007 rev.) The second paragraph of the Sand model has been deleted because it is unduly suggestive in favor of the prosecution.

REQUEST NO. 4:

Media Coverage

Your verdict must be based solely on the evidence presented in this courtroom in accordance with my instructions. You must completely disregard any report which you have read in the press, or seen or heard on television, the radio, or the internet. Indeed, it would be unfair to consider such reports, since they are not evidence and the parties have no opportunity of contradicting their accuracy or otherwise explaining them away. In short, it would be a violation of your oath as jurors to allow yourselves to be influenced in any manner by such publicity.[1]

[1] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-17 (2007) (with addition of the internet).

REQUEST NO. 5:

Presumption of Innocence and the Government's Burden of Proof

Although the defendant, Mr. Treacy, has been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendant has pled not guilty to each charge in the indictment.

As a result of the defendant's plea of not guilty, the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are unanimously satisfied that the government has proven him guilty beyond a reasonable doubt.

The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.

This presumption was with the defendant when the trial began, and it remains with him even now as I speak to you, and will continue with him into your deliberations unless and until you are unanimously convinced that the government has proven his guilt beyond a reasonable doubt.[16]

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[16] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 4-1 (2007).

REQUEST NO. 6:

Reasonable Doubt

I have said that the government must prove the defendant guilty beyond a reasonable doubt. The question naturally is “what is a reasonable doubt?” The words almost define themselves. A reasonable doubt is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times on the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government’s burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to acquit the defendant. On the other hand, if after fair and impartial consideration of all the evidence you are satisfied of the defendant’s guilt beyond a reasonable doubt, you should vote to convict.[17]

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[17] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 4-2 (2007).

REQUEST NO. 7:

"Prove" and "Find"

Throughout the remainder of my instructions to you, I will use the word "prove" from time to time, with reference to the government's burden. I shall also speak of your "finding" various facts as to the elements of the crimes charged in this case.

Throughout my instructions, you should understand that whenever I say that the government has to "prove" a fact to you, I mean that it has to prove that fact to you beyond a reasonable doubt, as I just explained that term to you. You are to understand my use of the word "prove" to mean "prove beyond a reasonable doubt," even if I do not always repeat those exact words.

Similarly, when I say that you must "find" a fact in order to return a guilty verdict, you must find unanimously that fact to have been proven by the government beyond a reasonable doubt, even if I simply use the word "find."[18]

[18] *United States v. Forbes*, No. 3:02 CR 264, at 7 (D. Conn. 2007).

REQUEST NO. 8:

Testimony, Exhibits, Stipulations, and Judicial Notice

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received in evidence, stipulations and judicially noticed facts.

Exhibits which have been marked for identification but not received may not be considered by you as evidence. Only those exhibits received may be considered as evidence.

Similarly, you are to disregard any testimony when I have ordered it to be stricken. Only the witnesses' answers are evidence and you are not to consider a question as evidence. Similarly, statements by counsel are not evidence.

You should consider the evidence in light of your own common sense and experience, and you may draw reasonable inferences from the evidence.

Anything you may have seen or heard about this case outside of the courtroom is not evidence and must be entirely disregarded.[19]

[19] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-4 (2007).

REQUEST NO. 9:

Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in deciding whether a defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is where a witness testifies to what he saw, heard or observed. In other words, when a witness testifies about what the witness asserts is known to him of his own knowledge by virtue of his own senses—what the witness claims he saw, touched, felt or heard—that is called direct evidence.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside.

As you were sitting here, someone walked in with an umbrella which was dripping wet. Somebody else then walked in with a raincoat which also was dripping wet.

Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or the nonexistence of some other relevant fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be unanimously satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.[20]

[20] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-2 (2007).

REQUEST NO. 10:

Number of Witnesses and Uncontradicted Testimony

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing on your own common sense and personal experience.

Later on, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the government and the defendant is not required to call any witnesses or offer any evidence, since he is presumed to be innocent.[21]

[21] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 4-3 (2007).

REQUEST NO. 11:

Conduct of Counsel

Both the prosecutors and the defense attorneys are officers of the Court. They both have important professional roles, and they both adhere to the same standards of honesty and professional conduct.

In this trial, you should consider only the evidence. You should not consider the performance of the attorneys, or hold the performance of the attorneys for or against either party.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law were decided by me, the Court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.[22]

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[22] The first two paragraphs are intended to neutralize any preconceived views jurors may have about attorneys for either side. The second two paragraphs are from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 2-8 (2007).

REQUEST NO. 12:

Number of Counsel

As you undoubtedly noticed, there have been many attorneys and assistants in the courtroom, both for the government and the defendant. It is proper and normal for the parties to be represented by multiple attorneys and assistants. In a case of this length, this number of attorneys and assistants is not unusual. You should not let the number of representatives in the courtroom affect your consideration in any way.

REQUEST NO. 13:

Indictment Is Not Evidence

With these preliminary instructions in mind, let us turn to the charges contained in the indictment. I remind you that an indictment itself is not evidence. It merely describes the charges made against the defendant. It is only an accusation. It may not be considered by you as any evidence of the guilt of the defendant.

In reaching your determination of whether the government has proved the defendant guilty on any count beyond a reasonable doubt, you may consider only the evidence introduced or lack of evidence.[1]

[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-1 (2007).

B. ELEMENTS OF THE CHARGED OFFENSES

REQUEST NO. 14:

Multiple Counts – One Defendant

The indictment contains a total of two counts. Each count charges the defendant with a different crime.

You must, as a matter of law, consider each count of the indictment separately and return a separate verdict of guilty or not guilty for each count on which he is charged. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to any other offense.[23]

[23] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-6 (2007).

REQUEST NO. 15:

The Charges

The indictment contains two counts.

Count One charges that the defendant knowingly and intentionally entered into a criminal conspiracy to commit fraud in connection with the purchase and sale of securities issued by Monster; to willfully make and cause to be made false and misleading statements of material fact in applications, reports and documents that Monster filed with the SEC; to willfully make and cause to be made false and misleading statements to Monster's auditors; and to willfully falsify books, records, and accounts of Monster.

Count Two charges the defendant with committing securities fraud in connection with the backdating scheme by employing devices, schemes and artifices to defraud, and engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon purchasers and sellers of Monster securities.

[If Request No. 17, titled "Consider Only The Charges," based on Sand Instr. 3-3, is not given:] [The defendants are not charged with committing any crimes other than the offenses contained in the indictment.] The defendant has denied that he is guilty of these charges.[24]

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[24] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-2 (2007). The penultimate sentence is inserted from Sand, Instr. 3-3.

REQUEST NO. 16:

Consider Only the Charges
(If "other acts" evidence is introduced)

The defendant is not charged with committing any crimes other than the offenses contained in the indictment. You have heard evidence of other acts allegedly committed by the defendant. When that evidence was introduced, I instructed you that it was to be considered by you solely for a limited purpose. I will explain that limited purpose again in a moment. But I want to emphasize to you now that you are not to consider that evidence for any other purpose, and you are only to return a verdict as to the specific charges in the indictment.[1]

[1] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-3 (2007).

REQUEST NO. 17:

No Respondeat Superior Liability

There is one point I want to address before I review the elements of the charged offenses. You have heard testimony that the defendant held an executive position at Monster as Chief Operating Officer (COO) and President. I instruct you that you may not vote to convict the defendant based solely on the positions that he held within the company.

A defendant who is an officer, director, or employee of a corporation is not criminally responsible for the alleged acts of his subordinates merely because he held a senior position within the corporation. Therefore, it is not enough for the government to merely prove that the alleged conduct occurred at Monster for the defendant to be held criminally responsible. Nor is it enough for the government to prove that one or more individuals involved in the alleged conduct reported to the defendant. In addition, you may not infer that the defendant, based solely on his position at Monster, engaged in or had knowledge of the alleged misconduct. Furthermore, it is not enough for the government to prove that the defendant should have known about the alleged conduct at Monster. In each instance, the law requires that the government must prove beyond a reasonable doubt that the defendant acted with the particular unlawful intent required for that offense.[25]

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[25] Adapted from *United States v. Forbes*, No. 3:02 CR 264, at 11 (D. Conn. 2007).

REQUEST NO. 18:

Count One: Conspiracy – The Nature of the Offense Charged

Count One of the Indictment charges that the defendant and others came to an agreement or understanding to commit offenses against the United States in violation of Section 371 of Title 18 of the United States Code. Specifically, the indictment charges that the defendant knowingly and intentionally entered into an agreement to knowingly and willfully commit fraud in connection with the purchase and sale of securities issued by Monster; to willfully make and cause to be made false and misleading statements of material fact in applications, reports and documents that Monster filed with the SEC; and to willfully make and cause to be made false and misleading statements to Monster's auditors; and to willfully falsify books, records, and accounts of Monster.[26]

[26] The Indictment.

REQUEST NO. 19:

Count One: Conspiracy – The Statute Defining the Offense

The relevant statute covering these acts is Section 371 of Title 18 of the United States Code. It provides, in part, that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, . . .

an offense against the United States has been committed. 18 U.S.C. § 371.[27]

[27] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-9 (2007).

REQUEST NO. 20:

Count One: Conspiracy – Elements of Conspiracy

In order to satisfy its burden of proof, the government must establish each of the following four essential elements beyond a reasonable doubt:

First, that two or more persons entered the unlawful agreement charged in Count One of the indictment starting in or about 1996;

Second, that the defendant knowingly and willfully became a member of that alleged conspiracy, and did so with the requisite unlawful intent;

Third, that one of the members of the alleged conspiracy knowingly committed at least one of the overt acts charged in the indictment, during the period of the alleged conspiracy and within the statute of limitations; and

Fourth, that such overt act(s) which you find to have been committed during the period of the alleged conspiracy was/were committed to further some objective of the conspiracy.[28]

[28] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-3 (2007).

REQUEST NO. 21:

Count One: Conspiracy – First Element (Existence of Unlawful Agreement)

The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in Count One of the indictment. That Count alleges that the defendant conspired with others to commit securities fraud, to make false and misleading statements to the SEC, to make false and misleading statements to Monster's auditors; and to falsify Monster's books, records, and accounts in order to grant the defendant and others at Monster valuable in the money stock option grants and to avoid reporting a compensation expense for such grants.

In order for the government to satisfy this element, you need not find that the alleged members of the alleged conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act, as charged in Count One of the indictment.

You may, of course, find that the existence of an unlawful agreement to disobey or disregard the law, as charged in Count One of the indictment, has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the people involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an unlawful agreement existed here, consider the actions and statements of all of those you find to be participants in the alleged conspiracy as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose, as charged in Count One of the indictment.[29]

The indictment charges that there were four objects, or goals, of the alleged conspiracy: to commit fraud in connection with the purchase and sale of securities issued by Monster; to willfully make and cause to be made false and misleading statements of material fact in applications, reports and documents that Monster filed with the SEC; to willfully make and cause to be made false and misleading statements to Monster's auditors; and to willfully falsify books, records, and accounts of Monster.

Object 1: Securities Fraud

I will instruct you on the elements of securities fraud when I get to the count of the indictment that charges that offense.

The other objects, making and causing to be made false and misleading statements of material fact in applications, reports and documents filed with the SEC, making and causing to be made false and misleading statements to Monster's auditors, and falsifying or causing to be falsified the books, records and accounts of Monster, are not charged as separate counts in the indictment. You are to consider them only to determine whether they were objects or goals of the alleged conspiracy.

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[29] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-4 (2007).

The second paragraph regarding the need for unanimity is adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-7A (2007). "Instruction 9-7A has been drafted for conspiracy counts, but may be adapted when other crimes are charged requiring this augmented unanimity charge." *Id.*, Comment, at 9-22 (June 2007 rev.); *see also* the cases collected in the Sand, Comment, at 9-22 through 9-23.

Object 2: False and Misleading Statements to the SEC

To prove this object the government must prove that two or more persons agreed to make, or cause to be made, a materially false or misleading statement in a financial statement to be filed with the SEC. This object has four elements:

First, the government must prove that the SEC report you are considering contained a false statement of fact. A statement is not false merely because subsequent events prove it to have been erroneous. The statement must have been false when it was made.

Second, the government must prove that the alleged false statement of fact was "material." If you decided that a particular statement was false when it was made, then you must determine if the fact stated was a material fact under the evidence in this case. In order for you to find a material fact, the government must prove that the fact misstated was of such importance that it would reasonably be expected to cause or to induce a person to invest or to cause or to induce a person not to invest. A fact is material only if there is a substantial likelihood that a reasonable investor would have viewed the fact as having significantly altered the total mix of information available. You should only be concerned with such material misstatements and not with minor, meaningless or unimportant ones. Any false statement of material fact must have been material on the date the SEC report was filed.

Third, the government must prove that the defendant agreed to make or cause to be made the alleged false statement of material fact in the SEC report at issue. In this regard, it is sufficient to establish this element of the offense if the government proves that the defendant agreed to cause that false statement of material fact in the SEC report at issue to be made by others. The defendant may not be held responsible for any false statement in an SEC report that he did not agree to make or cause to be made.

Fourth, the government must prove that the defendant knowingly, willfully and with the intent to deceive agreed to file such false statements of material fact with the SEC. The term "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. An act is done "willfully" if it is done with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. This element will not be satisfied if a defendant believed in good faith that the entries to be made were accurate. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. An act is done with the "intent to deceive" if it is done with the intent to mislead another or to cause another to believe that a falsehood is true, but not necessarily for the purpose of causing some financial loss to another.

Object 3: False and Misleading Statements to Auditors

To prove this object the government must prove that two or more persons agreed that the directors or officers of the public company agreed to make or cause to be made a materially false or misleading statement; or that those directors or officers agreed to omit to state, or cause another to omit to state, a material fact necessary in order to make the statement made, in light of the circumstances under which such statements were made, not misleading. This object has four elements:

First, the government must prove that the audits you are considering contained a false statement of fact or omission. A statement is not false merely because subsequent events prove it to have been erroneous. The statement must have been false when it was made.

Second, the government must prove that the alleged false statement of fact or omission was "material." If you decided that a particular statement was false when it was made or that a particular omission was made, then you must determine if the fact stated or omission made was a material fact or omission under the evidence in this case. In order for you to find a material fact or omission, the government must prove that the fact misstated or omission was of such importance that it would reasonably be expected to cause or to induce a person to invest or to cause or to induce a person not to invest. A fact or omission is material only if there is a substantial likelihood that a reasonable investor would have viewed the fact or omission as having significantly altered the total mix of information available. You should only be concerned with such material misstatements and omissions and not with minor, meaningless or unimportant ones. Any false statement or omission of material fact must have been material on the date the audits, reviews and examinations of financial statements were required to be filed.

Third, the government must prove that the defendant agreed to make or cause to be made a materially false or misleading statement; or, in the alternative, that the defendant agreed to omit to state or cause others to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading. These false statements or omissions must have been in connection with audits, reviews and examination of financial statements. In this regard, it is sufficient to establish this element of the offense if the government proves that the defendant agreed to cause that false statement or omission of material fact in the audits, reviews and examinations at issue to be made by others. The defendant may not be held responsible for any false statement or omission in an audit, review or examination that he did not agree to make or cause to be made.

Fourth, the government must prove that the defendant knowingly, willfully and with the intent to deceive agreed to make or cause others to make such false statements of material fact to accountants; or in the alternative, agreed to omit to state or cause others to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading. The term "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. An act is done "willfully" if it is done with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. This element will not be satisfied if a defendant believed in good faith that the entries to be made were accurate. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. An act is done with the "intent to deceive" if it is done with the intent to mislead another or to cause another to believe that a falsehood is true, but not necessarily for the purpose of causing some financial loss to another.

Object 4: Falsification of Books and Records

To prove this object the government must show that Monster was required to file reports under federal law and that two or more persons agreed to falsify, or cause another to falsify, the books, records, or accounts of Monster, or cause those books, records or accounts to be falsified. This object has four elements:

First, that at the time of the alleged offense, Monster was required to file reports with the SEC. I instruct you that publicly traded corporations are required to file documents and reports as prescribed by the SEC. Therefore, if you find the government has proved that Monster was a publicly traded company, this would mean that it was required to file reports with the SEC.

Second, the government must prove that the defendant agreed to falsify the books, records, or accounts of Monster, or agreed to cause those books, records or accounts to be falsified in a material respect. To satisfy this element, the law does not require that the defendant personally make the false entries in the books, records or accounts. It is enough if he causes or directs others to make such false entries.

Third, the government must prove that such books, records or accounts were of the type that were required to reflect in reasonable detail the transactions and dispositions of the assets of Monster. Such records include, for example, general ledgers, journal entries, income statements, and account records. You must be unanimous as to which books, records, or accounts the defendant agreed to falsify.

Fourth, the government must prove that the defendant agreed to knowingly and willfully falsify such entries. The term “knowingly” means to act voluntarily and deliberately, rather than mistakenly or inadvertently. An act is done “willfully” if it is done with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. This element will not be satisfied if the defendant believed in good faith that the entries to be made were accurate. The defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

The government is not required to prove that there was an agreement to commit every one of the objects I have described to you. But the government must prove beyond a reasonable doubt that there was an agreement to accomplish at least one of these unlawful objectives charged in Count One, and you must agree unanimously that it was the same unlawful objective. It is not enough to satisfy this element of the offense if some of you find that the government has proven an agreement to accomplish one unlawful objective while others of you find that the government has proven only an agreement to accomplish a different unlawful objective. If you do not agree unanimously that the government has proven beyond a reasonable doubt an agreement to accomplish the same unlawful objective with respect to at least one of the four objects of the conspiracy charged in the indictment, you must return a verdict of not guilty with respect to Count One.[30]

[30] Adapted from *United States v. Forbes*, No. 3:02 CR 264, at 15-17 (D. Conn. 2007) (as conformed to the object offenses alleged in this case). For the definition of "willfully" in this instruction, *see* 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3A-3 (2007), and the supporting authority for Request No. 29 herein (Securities Fraud – Third Element (Knowledge, Intent and Willfulness)).

REQUEST NO. 22:

Count One: Conspiracy – Second Element (Membership In The Conspiracy)

The second element of conspiracy that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully, and voluntarily became a member of the alleged conspiracy, and did so with the requisite unlawful intent.

* * * * *

In connection with this second element of the alleged offense, I am going to instruct you on the concepts of "knowingly" and "willfully"; second, on the concept of "requisite intent"; and third, on the concept of "good faith."

The question of whether a person acted knowingly, willfully and with the requisite intent is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

A person acts knowingly when he or she acts voluntarily and purposefully, and not because of ignorance, mistake, accident or carelessness.

An act is done "willfully" if it is done with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. It is not necessary for the government to prove beyond a reasonable doubt that the defendant knew that he was breaking any particular law or rule, but the government must prove beyond a reasonable doubt that the defendant was aware of the generally unlawful nature of his acts.

* * * * *

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant was, in fact, a member of the conspiracy, you must consider whether the defendant knowingly and willfully joined the conspiracy, intending to advance or achieve its goals. Did he participate in the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective?

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that the defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the aims and purposes of the unlawful agreement.

It is important for you to note that the defendant's participation in the alleged conspiracy must be established by independent evidence of his own acts or statements. You may also consider, but you may not exclusively rely on, acts or statements of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them. The defendant's knowledge is a matter of inference from the facts proved.

The extent of the defendant's participation has no bearing on the issue of the defendant's guilt. A conspirator's liability is not measured by the extent or duration of his or her participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that a defendant's mere presence at the scene of the alleged crime does not, by itself, make him a member of the alleged conspiracy. Similarly, mere association with one or more members of the alleged conspiracy does not automatically make the defendant a member. A person may know, supervise, work for or with, or be friendly with a member of a conspiracy, without being a conspirator himself. Mere similarity of conduct or the fact that individuals may have worked together and discussed common aims and interests does not make them members of a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan does not make a defendant a member of the conspiracy. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of a conspiracy does not make him a member of the conspiracy. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

The government is not required to prove that the members of the alleged conspiracy were successful in achieving any or all of the objects of the conspiracy.

In order to prove that the defendant became a member of the alleged conspiracy to commit a particular object offense, the government must also prove, beyond a reasonable doubt, that the defendant acted with the same unlawful intent that must be proven with respect to that alleged object of the alleged conspiracy. If you find that the government has failed to establish that the defendant acted with the unlawful intent needed to commit a particular object offense, you must find the defendant not guilty with respect to the charge of conspiracy to commit that offense.

Securities fraud, which is the first object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the intent to defraud Monster's shareholders. In order to prove that the defendant became a member of the alleged conspiracy with respect to the object offense of securities fraud, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that the defendant acted knowingly, willfully, and with the intent to defraud Monster's shareholders.

"Intent to defraud": in the context of the securities laws, an act is done with the intent to defraud if it is done knowingly with the intent to deceive or defraud.

Making or causing to be made materially false statements in reports required to be filed with the SEC, which is the second object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the intent to deceive. In order to prove that the defendant became a member of the alleged conspiracy with respect to the object offense of making or causing to be made false statements in reports required to be filed with the SEC, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that the defendant acted knowingly, willfully, and with the intent to deceive.

"Intent to deceive": an act is done with the intent to deceive if it is done with the intent to mislead another or to cause another to believe that a falsehood is true, but not necessarily for the purpose of causing some financial loss to another.

Making or causing to be made material false statements to auditors, or in the alternative, omitting to state or causing others to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading, which is the third object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the intent to deceive. In order to prove that the defendant became a member of the alleged conspiracy with respect to this object offense, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that the defendant acted knowingly, willfully, and with the intent to deceive.

Falsifying or causing to be falsified the books, records, and accounts of Monster, which is the fourth object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that the defendant acted knowingly and willfully with the intent to do something the law forbids. In order to prove that the defendant became a member of the alleged conspiracy with respect to the object offense of falsifying or causing to be falsified the books, records, and accounts of Monster, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that the defendant acted knowingly and willfully with the intent to do something the law forbids.

"Intent to do something the law forbids": an act is done with the intent to do something the law forbids if it is done with bad purpose either to disobey or disregard the law.

Because the government must prove beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the unlawful intent to establish membership in the conspiracy, the good faith of the defendant is a complete defense. I will instruct you on the defense of good faith in a moment.[31]

[31] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-6 (2007) (as conformed to the object offenses alleged in this case); *United States v. Forbes*, No. 3:02 CR 264, at 18-24 (D. Conn. 2007).

REQUEST NO. 23:

Count One: Conspiracy – Third Element (Commission Of Overt Act)

In order to sustain its burden of proof under Count One of the indictment, the government must prove beyond a reasonable doubt that one of the members of the alleged conspiracy or agreement knowingly and willfully performed at least one overt act in furtherance of the objectives of the conspiracy, and that this overt act was performed during the existence or life of the conspiracy, and was done to somehow further the goal(s) of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the members of a conspiracy which evidences that agreement that furthers the objectives of the conspiracy. The government must prove beyond a reasonable doubt that at least one of the alleged overt acts in the indictment was committed by an alleged member of the alleged conspiracy, and all of you must agree unanimously that it was the same overt act. It is not enough to satisfy this element if some of you find that the government has proven one overt act, while others of you find that the government has proven a different overt act. If you do not agree unanimously, with respect to at least one of the overt acts charged in the indictment, that the government has proven that specific overt act beyond a reasonable doubt, then you must return a verdict of not guilty with respect to Count One.

The indictment alleges numerous over acts. Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged. The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

One more thing about overt acts. There is a limit on how much time the government has to obtain an indictment. This is called the statute of limitations. For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy within the five year period before the government obtained the Indictment.[32]

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[32] Adapted from 2 O'Malley, *et al.*, Federal Jury Practice and Instructions, § 31.07 (6th ed. 2006).

The third paragraph regarding the need for unanimity is adapted from the Court's instructions in *United States v. Forbes*, No. 3:02 CR 264, at 26-27 (D. Conn. 2007).

With respect to the overt act requirement, Judge Sand's model instruction follows a Ninth Circuit approach. Rather than define "overt act" for the jury, the Sand, recommended instruction "does away with the need for such a definition by incorporating the overt act(s) alleged in the indictment into the charge to the jury." 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-7, Comment, at 19-47 & n.4 (release 43B, 12/03) (citing *United States v. Jones*, 712 F.2d 1316, 1322 (9th Cir. 1983)).

The defendant respectfully opposes this approach, for two reasons. First, it is impractical in this case. The Superseding Indictment charges 30 separate overt acts. SI at 32-36. Incorporating each of these allegations would significantly add time to the reading of the charge. Not only would such incorporation be cumbersome, it would tax the jury's attention, and threaten to distract from, if not overwhelm, the remainder of the Court's instructions concerning the law applicable to this case. Second, and just as important, to simply incorporate the allegations of the indictment would infringe the role of the jury, by removing from their consideration the question of whether any of those acts satisfied the legal definition of an overt act in furtherance of the conspiracy. The defendant submits that his entitlement to a jury determination of every element of the offense, *e.g.*, *United States v. Gaudin*, 515 U.S. 506 (1995), requires that the jury be instructed on the legal definition of overt act. Accordingly, the defendant offers the definition contained in the O'Malley model instruction, which takes this traditional approach.

REQUEST NO. 24:

Count One: Conspiracy – Fourth Element (Furtherance of the Conspiracy)

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed, during the period of the alleged conspiracy, for the purpose of carrying out the alleged unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done during the period of the alleged conspiracy, by at least one alleged conspirator, in furtherance of some object or purpose of the conspiracy charged in the indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting a conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy.

As the Court has already mentioned, there is a limit on how much time the government has to obtain an indictment, referred to as the statute of limitations. The government must therefore convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of carrying out the alleged unlawful agreement within the five year period before the government obtained the Indictment, in order for you to return a guilty verdict.

In order to establish that the defendant is guilty of the charge of conspiracy, the government must prove beyond a reasonable doubt each and every one of these four elements. If you find that the government has failed to prove any of these elements beyond a reasonable doubt, then you must acquit the defendant of the conspiracy charge.[33]

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[33] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-8 (2007).

REQUEST NO. 25:

Count Two: Securities Fraud – The Nature of the Offense Charged

Count Two of the Indictment charges that the defendant violated 17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2, by knowingly and willfully (1) employing devices, schemes and artifices to defraud, (2) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (3) engaging in acts, practices and courses of business which operated and would operate as a fraud upon purchasers and sellers of Monster securities.[34]

[34] The Indictment.

REQUEST NO. 26:

Count Two: Securities Fraud – The Statutes Defining the Offense

Section 78j(b) of Title 15 of the United States Code provides, in part, that it is unlawful

> [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Section 78ff of Title 15 of the United States Code provides, in part, that:

> [A]ny person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact . . .

shall be guilty of a crime against the United States. 15 U.S.C. § 78ff.

Section 240.10b-5 of Title 17 of the Code of Federal Regulations provides, in part, that it is unlawful

> for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.[35]

[35] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-9 (2007).

REQUEST NO. 27:

Count Two: Securities Fraud – The Elements of the Offense

In order to meet its burden of proof, the government must establish beyond a reasonable doubt the following elements of the crime of securities fraud:

First, that in connection with the purchase or sale of Monster stock the defendant did any one or more of the following:

> (a) knowingly employed a device, scheme or artifice to defraud, or
>
> (b) knowingly made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or
>
> (c) knowingly engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

Second, that the defendant acted willfully, knowingly and with the intent to defraud; and

Third, that the defendant knowingly used, or caused to be used, any means or instruments of transportation or communication in interstate commerce or used the mails in furtherance of the fraudulent conduct.[36]

[36] Adapted from 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-20 (2007); *United States v. Forbes*, No. 3:02 CR 264, at 41-42 (D. Conn. 2007).

REQUEST NO. 28:

Count Two: Securities Fraud – First Element (Fraudulent Act)

The first element that the government must prove beyond a reasonable doubt is that in connection with the purchase or sale of Monster securities the defendant did either one or both of the following, as charged in the indictment:

> (a) knowingly employed a device, scheme or artifice to defraud, or
>
> (b) knowingly made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or
>
> (c) knowingly engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.[37]

It is not necessary for the government to establish all three types of fraudulent conduct in connection with the sale or purchase of Monster securities. Any one will be sufficient to satisfy this element of the offense. However, you must be unanimous as to which type of unlawful conduct you find to have been proven beyond a reasonable doubt. Also, if you find that the only type of fraudulent conduct the government has proved beyond a reasonable doubt is that the defendant knowingly made, or caused to made, an untrue statement of a material fact, or omitted to state a material fact that made other statements misleading, then you must be unanimous as to at least one of the statements or omissions that you find to have been materially false or misleading.

A "device, scheme, or artifice to defraud" is a plan for the accomplishment of any objective. A "device" is an invention, a contrivance, or the result of some plan or design. A

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[37] Rule 10b-5(b) has been removed from the charges per the Court's ruling.

"scheme" is a design or a plan formed to accomplish some purpose. An "artifice" is a deliberate contrivance or plan of some kind. There is nothing about the terms "device," "scheme," or "artifice" which in and of themselves imply anything fraudulent. The terms are plain English words that are neutral. Fraud is a general term which embraces all efforts and means that individuals devise to take advantage of others. The law which the defendant is alleged to have violated prohibits all kinds of manipulative and deceptive acts.

The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case. It must, however, relate to the misrepresentation or omission of a material fact, which I will define for you shortly.

A statement, representation, claim, or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made with the intention to deceive. The concealment of material facts in a matter that makes what is said or represented deliberately misleading may also constitute false or fraudulent statement under the statute.

You need not find that the defendant actually participated in any securities transaction if the defendant was engaged in fraudulent conduct that was "in connection with" a purchase or sale. The "in connection with" aspect of this element is satisfied if you find that there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities.

It is no defense to an overall scheme to defraud that the defendant was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant was the actual seller or offeror of the securities. It is sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of stock. By the same token, the government need not prove that the defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statement was true or false when it was made, and in the case of alleged omissions, whether the omission was misleading.

If you find that the government has established beyond a reasonable doubt that a statement was false or omitted, you must next determine whether the fact misstated was material under the circumstances. A material fact is one that would have been significant to a reasonable investor's decision. In other words, the government must prove beyond a reasonable doubt that the misstated or omitted fact altered the total mix of information available and was of such importance that it could reasonably be expected to cause or to induce a person to invest or not to invest. The securities fraud statute does not prohibit misstatements or omissions that would not be important to a reasonable investor. We use the word "material" to distinguish between the kinds of statements investors care about and those that are of no real importance.

It does not matter whether the alleged conduct was successful or not, or if the defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of the crime charged.[38]

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[38] Adapted from 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-21 (2007). In the third paragraph, the definitions for the terms "device," "scheme," and "artifice" come from a similar charge in *United States v. Forbes*, No. 3:02 CR 264, at 42-46 (D. Conn. 2007). However, the term "ingenious" has been replaced with "deliberate." "Ingenious" is a somewhat dated term that is unduly inflammatory. "Deliberate" captures the requisite fraudulent intent in a less inflammatory way.

This proposed instruction modifies the model definitions of “device, scheme or artifice to defraud” (Rule 10b-5(a)) and “fraud or deceit on any person” (Rule 10b-5(c)) to specify that each of these elements requires deception and materiality (i.e., either misrepresentation of a material fact, or omission of a material fact where there was a duty to disclose). In a line of cases culminating in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761 (Jan. 15, 2008), the Supreme Court has consistently held that the conduct prohibition derives from the statutory Section 10(b), and that the prohibitions in Rule 10b-5 do not extend further than those in the statute. *Stoneridge*, 128 S.Ct. at 768; *see also Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 173-77 (1994); *Santa Fe Ind. v. Green*, 430 U.S. 462, 471-74 (1977). Thus, each prong of Rule 10b-5 must contain the essential elements of Section 10(b)’s core prohibition, either a manipulative or a deceptive device or contrivance. *Central Bank*, 511 U.S. at 177; *see In re Charter Comm’s, Inc. Sec. Lit.*, 443 F.3d 987, 992 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1873 (2007). Because “manipulative” is a term of art designating market manipulation (*Santa Fe*, 430 U.S. at 476-77), which is not alleged in this case, the relevant proscription is on deception. Abundant Supreme Court case law has held that such deception must have at its core either misstatement, or omission if there is a duty to speak, of a material fact. *E.g.*, *Central Bank*, 511 U.S. at 174 (citing *Santa Fe* and *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)). These elements are the irreducible requirements of the proscriptions contained in each prong of Rule 10b-5.

The last sentence of the Sand, model, regarding whether the alleged fraudulent conduct “touched upon” a securities transaction, is omitted because it is based on outdated law. The Second Circuit concluded in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir. 1984), that the “touching upon” language used by Justice Douglas in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971), was simply a variation of “in connection with,” and was not intended to loosen that statutory requirement. *Chemical Bank*, 726 F.3d at 942.

REQUEST NO. 29:

Count Two: Securities Fraud – Second Element (Knowledge, Intent and Willfulness)

The second element that the government must establish beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully and with intent to defraud.

To act "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

To act "willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" in the context of the securities laws means to act knowingly with the intent to deceive or defraud.

*   *   *   *   *

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind. Direct proof of knowledge and fraudulent intent is almost never available.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. These elements of the crime charged – knowledge and intent – must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of securities fraud. As I will instruct you, a defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and a defendant's consequent lack of good faith beyond a reasonable doubt. I will instruct you further on the defense of good faith in a moment.

As a practical matter, in order to sustain the charge against the defendant, the government must establish beyond a reasonable doubt that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless, he associated himself with the alleged fraudulent scheme.

Knowledge may be found from circumstances that would convince an average, ordinary person. Thus, you may find that the defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard for whether it was true or false and with a conscious purpose to avoid learning the truth. If you find beyond a reasonable doubt that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of the defendant.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme and lacked the intent to deceive, you should acquit the defendant of Count Two. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely the existence of a scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with intent to defraud, then you must turn to the third element, about which I am about to instruct you.[39]

[39] Adapted from 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-24 (2007). *See also United States v. Forbes*, No. 3:02 CR 264, at 49-51 (D. Conn. 2007).

"Willfully," as used throughout these instructions defining securities fraud offenses, "means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law." This is from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3A-3 (2007), and was given in *Forbes*.

REQUEST NO. 30:

Count Two: Securities Fraud – Third Element (Instrumentality of Interstate Commerce)

The third and final element that the government must prove beyond a reasonable doubt is that the defendant knowingly used, or caused to be used, instruments of communication in interstate commerce in furtherance of the scheme to defraud or fraudulent conduct. "Instruments of communication in interstate commerce" include the mails, and/or electronic communications over the internet.

It is not necessary that the defendant be directly or personally involved in any mailing or electronic transmission. If the defendant was an active participant in the scheme and took steps or engaged in conduct which he knew or could reasonably foresee would naturally and probably result in a mailing or electronic transmission over the internet, then you may find that he caused the use of instruments of communication in interstate commerce.

When one does an act with the knowledge that the use of interstate means of communication will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he causes such means to be used.

Nor is it necessary that the items sent through mail or electronic means contain the fraudulent material, or anything criminal or objectionable. The matter mailed or transmitted may be entirely innocent.

The use of the mails or the internet need not be central to the execution of the scheme, and may even be incidental to it. All that is required is that the use of the mails or the internet bears some relation to the object of the scheme or fraudulent conduct.

In fact, the actual purchase or sale need not be accompanied or accomplished by the use of the mails or the internet, so long as the defendant is still engaged in actions that are a part of a fraudulent scheme.[40]

[40] Adapted from 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-25 (2007), to conform to the allegations contained in Count Two of the Superseding Indictment.

REQUEST NO. 31:

Definition of "Materiality" for All Counts

If you decide that a particular statement or omission was false or misleading at the time that it was made, you must determine whether the statement or omission was "material." It is not enough to find that a particular statement or omission was inaccurate, misleading or even a "lie" because not all lies are "material" under the securities laws.

In order for you to find a statement or omission material, the government must prove beyond a reasonable doubt that it was substantially likely that a reasonable investor would have considered the statement or omission important in deciding whether to purchase or sell shares of Monster stock. "Important" means that there was a substantial likelihood that a reasonable investor would have acted *differently* if the misrepresentation had not been made or the truth had been disclosed. In deciding whether the fact or omission was "important," you must consider the "total mix" of information made available about Monster. For you to find materiality, the government must prove beyond a reasonable doubt that it was substantially likely that a reasonable investor would have viewed disclosure of the omitted fact as having significantly altered the total mix of information available – in other words, that there was a substantial likelihood that a reasonable investor would have acted differently (in his buying and selling decisions) if the alleged misrepresentation had not been made or the truth had been disclosed.

If, on the other hand, you find a reasonable investor would not have considered the fact important to his or her investment decision, or you find disclosure of the omitted fact would not have significantly altered the total mix of information available, the statement or omission is not material.[41]

[41] Adapted from 2B O'Malley, *et al.*, Federal Jury Practice and Instructions, § 62.14 (5th ed. 2000).

REQUEST NO. 32:

Statute of Limitations

If you find that the government has proven beyond a reasonable doubt all three elements of Count Two, you must also find that the defendant engaged in a specific act in furtherance of the scheme to defraud or the fraudulent conduct within the five year period before the government obtained the Indictment. This is the relevant cut off date under the statute of limitations.

The action must have been taken by the defendant and not by any alleged co-conspirators. If you do not find that the defendant took an action to further the alleged scheme to defraud or the fraudulent conduct within this five year period, you must vote to acquit the defendant of Count Two.

REQUEST NO. 33:

Retroactive Dating or Pricing is not Illegal

Retroactively dating or pricing [or, alternatively, backdating] stock option grants is not illegal per se. The mere fact that options may have been retroactively dated or priced [or, in the alternative, backdated] does not mean that any laws were violated.[42]

During this trial, you may have heard the parties or witnesses use the term "backdating" in reference to how a document is dated. "Backdating" a document is often necessary in everyday business situations where the intent is to memorialize an event that occurred on an earlier date, or if the parties agree that a particular agreement should become "effective as of" an earlier date. In these situations, "backdating" or using an "as of" or "effective" date is perfectly proper and legal. As an example, if an employee is told on January 1, 2009 that his salary has been increased, but the paperwork documenting the salary increase is not completed until March 1, 2009, it is not deceptive or misleading for the documentation to state that the employee's salary was increased "as of" January 1, 2009.

Likewise, retroactive dating or pricing, or "backdating," stock option grants or related paperwork, is not, in and of itself, illegal. The fact that options, grant lists, committee minutes, or other paperwork may have been retroactively dated, or that stock options may have been retroactively priced, does not by itself establish a criminal violation of the federal securities laws. As I have instructed you, the government must prove beyond a reasonable doubt that there was an intent to deceive on the defendant's part.[43]

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[42] It is well established that "backdating" alone (i.e., selecting dates which are favorable to the grantee in retrospect) is not illegal. *See United States v. Shanahan*, No. 4:07 CR 175JCH (DDN), 2008 WL 2225731, at * 5 (E.D. Mo. May 28, 2008); *In re Comverse Technology, Inc. Securities Litigation*, 543 F. Supp. 2d 134, 138 (E.D.N.Y. 2008).

[43] Final paragraph is adapted from *United States v. Reyes*, C-06-0556 (N.D. Cal. 2007).

REQUEST NO. 34:

Granting "In-The-Money" Stock Options is not Illegal

A stock option is granted "in-the-money" when it is granted at a price lower than the fair market value of the stock on the date in which the option is granted. Granting "in-the-money" stock options is not illegal per se.[44]

[44] *In re Computer Sciences Corp. Deriv. Litig.*, Lead No. 06 Civ. 5288, 2007 WL 1321715, at *2 (C.D. Cal. Mar. 26, 2007) (recognizing that "the practice [of granting 'in-the-money' options] is not improper, in and of itself"); *Adams v. Amdahl*, No. 06 CR. 873, 2006 WL 2620400 (W.D. Wash. Sept. 12, 2006) ("Companies are allowed to compensate their executives by providing them with options to purchase stock at prices lower than market value. These are called 'in-the-money' options.").

REQUEST NO. 35:

Good Faith

In considering the various charges alleged in this case, you must consider whether the defendant acted in good faith. Good faith is a complete and absolute defense to the charges in this case.

Good faith on the part of a defendant is simply inconsistent with the unlawful intent to join a conspiracy. Similarly, good faith on the part of a defendant is a complete and absolute defense to the charge of securities fraud because a defendant who acted in good faith cannot be found to have acted with the unlawful intent to defraud.

If a person holds a good faith belief that he was acting in accordance with the law, there is no crime. This is so even if he is mistaken and even if he was, in fact, not acting in accordance with the law. An honest mistake of judgment or negligence is not unlawful intent, and a defendant who acts on such a basis can still be acting in good faith. A person who believes in good faith that his actions comply with the law cannot be found guilty of a crime. Therefore, if the defendant believed that he was acting in accordance with the law, he cannot be found to have acted with criminal intent and you must find him not guilty.

A person does not act in "good faith" if, even though he honestly holds a certain opinion or belief, that person also knowingly makes false or fraudulent pretenses, representations, or promises to others.

The burden of proving good faith does not rest with the defendant because the defendant does not have to prove anything in this case. The government has the burden of proving beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the unlawful intent required for the charge you are considering. If the evidence in the case leaves you with a reasonable doubt as to whether the defendant acted in good faith, you must find the defendant not guilty.[45]

[45] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 8-1 (2007); *see also United States v. Forbes*, No. 3:02 CR 264, at 25-26 (D. Conn. 2007); *United States v. Sattar*, No. 02 CR 395 (S.D.N.Y. 2005).

REQUEST NO. 36:

Reliance On Legal And Accounting Advice

You have heard evidence that in-house and outside lawyers retained by Monster and outside accountants retained by Monster may have prepared or reviewed certain documents or may have been otherwise involved in certain transactions. The defendant contends that such evidence supports his contention that he acted in good faith.

In determining whether the involvement of these professional advisors is evidence of good faith, you should consider the following. The mere fact that a defendant may have sought to involve, or been aware of the involvement of, lawyers and accountants does not, in itself, necessarily constitute good faith. Instead, you must ask yourselves whether that defendant honestly and in good faith sought to involve lawyers and accountants in order to ensure that such transactions were lawful; whether he took steps to ensure or believed others took steps to ensure, that all the facts were fully and fairly communicated to the lawyers and accountants; and whether he received and honestly relied on any advice communicated by the lawyers and accountants believing any such advice to be correct.

In short, you should consider whether, in seeking to involve lawyers and accountants, a defendant intended that his acts should be lawful. If he did so, you may consider that as evidence of good faith. On the other hand, no one can willfully and knowingly violate the law and excuse himself from the consequences of his conduct merely by pleading that lawyers and accountants were involved.

Whether the defendant acted in good faith, whether he or others made full and complete reports to Monster’s in-house and outside lawyers and outside accountants, and whether the involvement of these lawyers and accountants demonstrates good faith are questions for you to determine.[46]

[46] Adapted from the charge of the Honorable Leonard B. Sand in *United States v. Rigas*, No. 02 CR 1236 (LBS) (S.D.N.Y. 2004).

REQUEST NO. 37:

Introduction – Special Evidentiary Matters – Venue

In addition to the foregoing elements of the offenses I have just described, for each count in the indictment, you must consider whether any act in furtherance of the crime charged in that count occurred within the Southern District of New York.

You are instructed that the Southern District of New York includes the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess and Sullivan.

In this regard, the government need not prove that each crime itself was committed in this district or that the defendant himself was present here. It is sufficient to satisfy this element if, for each charged crime, any act in furtherance of the crime occurred within this district. If you find that the government has failed to prove that any act in furtherance of the crime occurred within this district—or if you have a reasonable doubt on this issue—then you must acquit.[47]

[47] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-11 (2007).

Although precedent holds that venue need be established only by a preponderance, *see United States v. Svoboda*, 347 F.3d 471, 485 (2d Cir. 2003), Judge Sand's recommended model jury instruction "goes beyond the acknowledged standards, requiring proof beyond a reasonable doubt. This approach is adopted in order to avoid confusion by interjecting a lower standard of preponderance of the evidence." *Id.*, Comment, at 3-24 (June 2007 rev.).

C. THEORIES OF THE DEFENSE

REQUEST NO. 38:

Theories Of The Defense

[To be submitted by the defendant at the conclusion of the trial.]

D. INSTRUCTIONS FOR DELIBERATIONS

REQUEST NO. 39:

Witness Credibility – General Instruction

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You, as jurors, are the sole judges of the credibility of each witness and of the weight that his or her testimony deserves.

It must be clear to you by now that you are being called upon to resolve various factual issues under the counts of the indictment, in the face of the very different pictures painted by the government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony.

Your decision whether or not to believe a witness may depend on how that witness impressed you. Was the witness candid, frank and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his testimony or did he contradict himself? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with the government or the defendant which may affect how he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice or hostility that may have caused the witness—consciously or not—to give you something other than a completely accurate account of the facts he or she testified to?

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about and you should also consider the witness' ability to express himself or herself. Ask yourselves whether the witness' recollection of the facts stands up in light of all other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor, the explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

If a witness is shown to have knowingly testified falsely concerning any matter of importance to this case, you have the right to distrust any other portions of the witness' testimony, though you need not do so. You may reject any or all of the testimony of that witness or give it such credibility or weight as you think it deserves.[48]

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[48] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-1 (2007).

The final paragraph is from the instruction in *United States v. Forbes*, No. 3:02 CR 264, at 71-72 (D. Conn. 2007).

REQUEST NO. 40:

Witness Credibility – Bias and Hostility (If Applicable)

In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger which some government witnesses may have towards the defendant.

Evidence that a witness is biased, prejudiced, or hostile toward the defendant requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.[49]

[49] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-2 (2007).

REQUEST NO. 41:

Witness Credibility – Impeachment by Prior Inconsistent Statement

You have heard evidence that a witness made a statement on an earlier occasion which counsel argues is inconsistent with the witness' trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the defendant's guilt. Evidence of the prior inconsistent statement was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight to be given to the inconsistent statement in determining whether to believe all or part of the witness' testimony.[50]

[50] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-19 (2007).

REQUEST NO. 42:

Accomplice Testimony – Witnesses Called by the Government

You have heard witnesses who testified that they were actually involved in planning and carrying out the crimes charged in the indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

I have given you some general considerations on credibility and I will not repeat them all here. Nor will I repeat all of the arguments made on both sides. However, let me say a few things that you may want to consider during your deliberations on the subject of accomplices.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony?

In sum, you should look at all the evidence in deciding what credence and what weight, if any, you will want to give to the accomplice witnesses.[51]

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[51] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-5 (2007).

The Supreme Court has long recognized that “serious questions of credibility” are raised by the testimony of alleged co-conspirators and witnesses granted immunity by the government. *Banks v. Dretke*, 540 U.S. 668, 701 (2004); *On Lee v. United States*, 343 U.S. 747, 757 (1952). Because the government alone “decides whether and when to use such witnesses, and what, if anything, to give them for their service[,]” such witnesses, “must be managed and carefully watched by . . . the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.” *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993); *accord Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (en banc).

Accordingly, the Supreme Court counsels the “submission of the credibility issue to the jury ‘with careful instructions.’” *Banks*, 540 U.S. at 701. The Supreme Court has specifically approved pattern jury instructions in several circuits that reflect the “special caution appropriate in assessing” testimony from witnesses benefiting from the Government’s leniency. *Id.* at 702; *see also United States v. Urlacher*, 979 F.2d 935, 938-39 (2d Cir. 1992) (noting with approval an instruction that an unindicted co-conspirator might fabricate testimony to receive favorable treatment, might be motivated to lie to serve his own interest, and that his testimony therefore should be carefully scrutinized).

REQUEST NO. 43:

Witness Credibility – Government Witness – Not Proper to Consider Guilty Plea

[Combine Requests No. 39, 40 as appropriate depending on government witnesses called.]

You have heard testimony from Myron Olesnyckyj, a government witness who pled guilty to charges arising out of the same facts as this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. This witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.[52]

[52] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-10 (2007).

REQUEST NO. 44:

Witness Credibility – Witnesses' Plea Agreement

In this case, there has been testimony from Myron Olesnyckyj, a government witness who pled guilty after entering into an agreement with the government to testify. There is evidence that the government entered into an agreement with this witness concerning sentencing issues and promised to bring the witness' cooperation to the attention of the sentencing court.

The government is permitted to enter into this kind of plea agreement. You, in turn, may accept the testimony of such a witness and convict the defendant on the basis of this testimony alone, if it convinces you of every element of the offense charged beyond a reasonable doubt.

However, you should bear in mind that a witness who has entered into such an agreement has an interest in this case different than any ordinary witness. A witness who realizes that he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.[53]

[53] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-11 (2007).

REQUEST NO. 45:

Witness Credibility – Hearsay Testimony (If Applicable)

You have heard about a number of statements made outside of court by witnesses who did not testify here in court. When a witness' out-of-court statement has been admitted, that witness' credibility may be attacked, and if attacked may be supported, in the same manner as if the witness had testified in court.[54]

[54] *See* Fed. R. Evid. 806; *Carver v. United States*, 164 U.S. 694, 697 (1897).

REQUEST NO. 46:

Witness Credibility – Law Enforcement Witnesses (If Applicable)

You have heard the testimony of **[insert names of law enforcement witnesses]**. The fact that a witness may be employed by the federal government as a law enforcement official or employee does not mean that his or her testimony is necessarily deserving of more or less consideration, or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.[55]

[55] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-16 (2007).

REQUEST NO. 47:

Witness Credibility – Expert Witness (If Applicable)

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.[56]

[56] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-21 (2007).

REQUEST NO. 48:

Missing Witness Not Equally Available to Defendant (If Applicable)

You have heard evidence about a **[number of]** witness**[es]** who **[has/have]** not been called to testify. The defense has argued that the witness**[es]** could have given material testimony in this case and that the government was in the best position to produce **[this/these]** witness**[es]**.

If you find that **[this/these]** uncalled witness**[es]** could have been called by the government and would have given important new testimony, and that the government was in the best position to call **[him/them]**, but failed to do so, you are permitted, but you are not required, to infer that the testimony of the uncalled witness**[es]** would have been unfavorable to the government.

In deciding whether to draw an inference that the uncalled witness**[es]** would have testified unfavorably to the government, you may consider whether the witness**[es]**' testimony would have merely repeated other testimony and evidence already before you.[57]

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[57] 1 L. Sand, *et. al.*, Modern Federal Jury Instructions, Instr. 6-5 (2007).

REQUEST NO. 49:

Improper Consideration of Defendant's Right Not to Testify (If Defendant Does Not Testify)

The defendant did not testify in this case. Under our constitution, a defendant has no obligation to testify or to present any other evidence because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.[58]

[58] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-21 (2007).

REQUEST NO. 50:

Testimony of Defendant (If Defendant Testifies)

In a criminal case the defendant cannot be required to testify, but, he chooses to testify, he is, of course, permitted to take the witness stand on his behalf. In this case, the defendant did testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest the outcome of this case. You should not disregard or disbelieve his testimony simply because he charged as the defendant in this case.[59]

[59] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-4 (2007).

REQUEST NO. 51:

Admission of Defendant (If Applicable)

There has been evidence that the defendant made **[a/certain]** statement**[s]** in which the government claims he admitted certain facts charged in the indictment.

In deciding what weight to give the defendant's statement**[s]**, you should first examine with great care whether **[the/each]** statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statement**[s]** such weight as you feel **[it/they]** deserve**[s]** in light of all the evidence.[60]

[60] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-19.

REQUEST NO. 52:

Similar Acts – Intent, Knowledge, Absence of Mistake (If Applicable)

The government has offered evidence tending to show that on a different occasion, the defendant engaged in conduct similar to the charges in the indictment.

In that connection, let me remind you that the defendant is not on trial for committing any act not alleged in the indictment. Accordingly, you may not consider this evidence of the similar act as a substitute for proof that the defendant committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. The evidence of the other, similar act was admitted for a much more limited purpose and you may consider it only for that limited purpose.

If you determine that the defendant committed the acts charged in the indictment and the similar acts as well, then you may, but need not draw an inference that in doing the acts charged in the indictment, that the defendant acted knowingly and intentionally and not because of some mistake, accident, or other innocent reasons.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other act he must have committed the acts charged in the indictment.[61]

[61] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-25 (2007).

REQUEST NO. 53:

Defendant's Reputation and Opinion of Defendant's Character (If Applicable)

The defendant called witnesses who have testified to his good reputation in the community. Some of those witnesses have also given their opinion of the defendant's good character. This testimony is not to be taken by you as the witnesses' opinion as to whether the defendant is guilty or not guilty. That question is for you alone to determine. You should, however, consider this character evidence together with all the other facts and all the other evidence in the case in determining whether the defendant is guilty or not guilty of the charges.

Such character evidence alone may indicate to you that it is improbable that a person of good reputation would commit the offense charged. Accordingly, if after considering all the evidence, including testimony about the defendant's good reputation and character, you find a reasonable doubt has been created, you must acquit him of all charges.

On the other hand, if after considering all the evidence, including that of the defendant's reputation and character, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should not acquit the defendant merely because you believe him to be a person of good reputation or good character.[62]

[62] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instrs. 5-14, 5-15 (2007).

REQUEST NO. 54:

Cross-Examination of Witness on Defendant's Character (If Applicable)

The prosecution asked certain questions on cross-examination of the defendant's character witnesses about specific acts supposedly committed by the defendant. I caution you that the prosecution was allowed to ask these questions only to help you decide whether the witnesses were accurate in forming their opinions or in describing the reputation of the defendant's character. You may not assume that the acts described in these questions are true, nor may you consider them as evidence that the defendant committed the crimes for which he is charged. You may therefore consider the questions only in deciding what weight, if any, should be given to the testimony of each character witness and for no other purpose. You should not consider such questions as any proof of the conduct stated in the question.[63]

[63] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-16 (2007).

REQUEST NO. 55:

Opinion as to Character of Witness To Impeach Witness' Credibility (If Applicable)

You have heard [**name of witness**] testify that in his opinion [**name of other witness**], one of the other witnesses who testified, is an untruthful person. Since you are the sole judges of the facts and the credibility of witnesses, you may consider such evidence in deciding whether or not to believe the witness whose character for truthfulness has been questioned, giving such character evidence whatever weight you deem appropriate.[64]

[64] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-18 (2007).

REQUEST NO. 56:

Acts and Declarations of Alleged Co-Conspirators

Evidence has been received in this case that certain persons, who are alleged in Count One of the indictment to be co-conspirators of the defendant, allegedly have done or said things during the alleged existence of the alleged conspiracy in order to further or advance its goals. Such acts and statements of these other individuals may be considered by you in determining whether or not the government has proven the charge in Count One of the indictment. However, since some of these alleged acts or statements may have occurred outside the presence of the defendant—and even been allegedly done or said without the defendant's knowledge—these alleged acts and statements should be examined with particular care by you before you consider them against the defendant, who did not do the particular alleged act or make the particular alleged statement.[65]

[65] 2 O'Malley, *et al.*, Federal Jury Practice and Instructions, § 31.06 (6th ed. 2006).

REQUEST NO. 57:

Testimony Concerning Alleged Co-Conspirators' Beliefs, Understanding, State of Mind or Intent

You have heard certain testimony from alleged co-conspirators concerning those witnesses' beliefs, understanding, state of mind or intent. Such testimony may be considered only with respect to the question of whether a conspiracy existed among two or more people to commit the objectives I described earlier. You may not consider this testimony at all with respect to the question of whether the defendant was a knowing and willful participant in the alleged conspiracy, or whether the defendant knowingly and willfully engaged in any wrongdoing.[66]

[66] *United States v. Forbes*, No. 3:02 CR 264, at 67 (D. Conn. 2007).

REQUEST NO. 58:

Prior Testimony (If Applicable)

You have heard evidence that one or more witnesses gave certain testimony in a prior proceeding. That testimony was generally read into the record by an attorney asking whether the witness previously gave such testimony.

Because testimony in the prior proceeding was under oath, evidence of a witness' testimony in the prior proceeding may be considered by you as evidence bearing on the defendant's innocence or guilt. You should consider this testimony just like any other testimony that occurred here in court.[67]

[67] *United States v. Forbes*, No. 3:02 CR 264, at 72 (D. Conn. 2007).

REQUEST NO. 59:

Charts and Summaries Admitted As Evidence (If Applicable)

The parties have presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.[68]

[68] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-12 (2007).

REQUEST NO. 60:

Charts and Summaries Not Admitted As Evidence (If Applicable)

The charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these schedules or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts, schedules or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts, schedules and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.[69]

[69] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-13 (2007).

REQUEST NO. 61:

Stipulations (If Applicable)

In this case you have heard evidence in the form of stipulations.

A stipulation is an agreement among the parties that a certain fact is true or that if called, a witness would have given certain testimony. You should regard such facts as true or accept as true the fact that the witness would have given the testimony. However, it is for you to determine the effect to be given that fact or testimony.[70]

[70] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-6 and 5-7 (2007). *See also United States v. Sattar*, No. 02 CR 395 (S.D.N.Y. 2005).

E. PROCEDURES YOU MUST FOLLOW

REQUEST NO. 62:

Selection of a Foreperson

When you get into the jury room, before you begin your deliberations, you should select someone to be the foreperson. The foreperson will be responsible for signing all communications to the Court and for handing them to the marshal during your deliberations.[71]

[71] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-5 (2007).

REQUEST NO. 63:

Duty to Consult and Need for Unanimity

The government, to prevail, must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds, your verdict should be guilty; if it fails, it should be not guilty. To report a verdict, it must be unanimous.

Your function is to weigh the evidence in this case and determine whether or not each defendant has been proven guilty, solely upon the basis of such evidence.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation—to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence—if you can do so without violating your own individual judgment.

Each of you must decide the case for yourself, after consideration, with your fellow jurors, of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

Your final vote must reflect your conscientious conviction as to how the issues should be decided.[72]

[72] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-7 (2007). The last sentence of the Sand, instruction ("Your verdict, whether guilty or not guilty, must be unanimous") has been omitted because it suggests the jury must reach a unanimous verdict, even despite a good faith impasse.

REQUEST NO. 64:

Unanimity of Theory

Your verdict must also be unanimous in another sense. Each offense charged in the indictment—conspiracy and securities fraud—contains multiple, alternative theories of guilt. For each count, in order to convict, you must be unanimous as to which theory of guilt applies.

For instance, Count One of the indictment charges that the defendant joined and participated in a conspiracy to commit several offenses: to defraud; to make misrepresentations and omissions of material fact in reports and documents to be filed by Monster as required by the SEC; to make misrepresentations and omissions of material fact to auditors; and to willfully falsify and cause to be falsified the books, records, and accounts of Monster. To find guilt on Count One, you must be unanimous as to which of these alleged unlawful goals of the conspiracy the defendant agreed to.

Count One further charges that, to achieve the goals of the charged conspiracy, one of its members committed one or more of several overt acts as specified in the indictment. To find guilt on Count One, you must be unanimous as to at least one of these particular alleged acts that was committed by a member of the alleged conspiracy, during the conspiracy, and in furtherance of the conspiracy within the statute of limitations.

Similarly, Count Two charges that the defendant knowingly and willfully employed devices, schemes and artifices to defraud, made untrue statements of material fact and omitted to state material facts and engaged in acts, practices and courses of business which operated and would operate as a fraud and deceit upon purchasers and sellers of Monster securities, and that for each count, the defendant did so with respect to a particular document filed with the SEC. To find guilt on Count Two, you must be unanimous as to which type of fraud, if any, the defendant engaged in (which scheme to defraud, or which misrepresentations or omissions of material facts, or which other acts which operated as a fraud on the investing public), and you also must unanimously conclude that such fraudulent conduct occurred in connection with the particular document alleged to have been filed for the count.

For each of these counts, in order to convict the defendant on that count, all twelve of you must agree on the specific offense committed and the specific theory by which he committed it. For each count, if all twelve of you do not agree, you may not convict the defendant on that count.[73]

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[73] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-7A (2007). "Instruction 9-7A has been drafted for conspiracy counts, but may be adapted when other crimes are charged requiring this augmented unanimity charge." *Id.*, Comment, at 9-22 (June 2007 rev.); see also the cases collected in the Sand, Comment, at 9-22 through 9-23.

REQUEST NO. 65:

No Research and Investigation

Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

For example, do not bring any books, like a dictionary, or anything else into the jury room with you to help you with your deliberations; and do not conduct any independent research, reading or investigation, on the internet or otherwise, about the case.

Make your decision based only on the evidence that you saw and heard here in court.[74]

[74] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 6-190 (2001).

REQUEST NO. 66:

Markings on Exhibits

Many of the exhibits in this case were stamped "confidential" or "redacted" or with identification numbers and/or letters before being provided to the parties as part of the litigation process. It is routine to stamp documents confidential or with identification numbers and/or letters in the litigation process. You are to draw no inference from the fact that a document was stamped confidential or with identification numbers and/or letters before being provided.[75]

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[75] Adapted from *United States v. Forbes*, No. 3:02 CR 264, at 65 (D. Conn. 2007).

REQUEST NO. 67:

Exhibits and Testimony; Use of the Indictment

You will have with you in the jury room the exhibits admitted during the trial. You will not, however, have a written transcript of the witnesses' testimony. If you want any of the testimony read to you, that can be done. But if you request that any portion of the testimony be read back, please be as specific as you possibly can. Otherwise, it might not always be easy to locate what you might want.

You will also have a copy of the indictment with you in the jury room during your deliberations. You may use it solely for the purpose of reading the offenses with which the defendants are charged. You are reminded, however, that an indictment is merely an accusation and is not evidence of any kind.[76]

[76] *United States v. Forbes*, No. 3:02 CR 264, at 80-81 (D. Conn. 2007). *See also United States v. Sattar*, No. 02 CR 395 (S.D.N.Y. 2005).

Respectfully submitted,

/s/ Reid H. Weingarten

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